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U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: CHICAGO, IL Date: FEB 02 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), and the relevant waiver application is, therefore, moot. The acting district director shall reopen the applicant's Form I-485 for action consistent with this decision.

The applicant is a native and citizen of Belize who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission (adjustment of status) to the United States by fraud or willful misrepresentation. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Acting District Director*, at 3-4, dated April 25, 2006.

On appeal, counsel asserts that the applicant's misrepresentation was not material and, alternatively, that the denial of the applicant's admission would result in extreme hardship to her spouse. *Brief in Support of Appeal*, at 2, received May 25, 2006.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, the applicant's statement, photographs of the applicant's family, country conditions information on Belize and the applicant's spouse's court dispositions. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant concealed a prior arrest for retail theft/shoplifting during her March 20, 2006 adjustment of status interview. The applicant asserted more than once that her 1996 arrest for battery was her only arrest. The applicant was found to be inadmissible under section 212(a)(6)(C) of the Act due to this misrepresentation.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Counsel states that the applicant's failure to disclose her arrest is not a material fact, the charges were dismissed, the misrepresented fact in no way affected her eligibility for adjustment of status and the requirement of a waiver is improper. *Brief in Support of Appeal*, at 3.

The AAO notes that the Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were "material" was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service's (now United States Citizenship and Immigration Services) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

> A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:
>
> a. the alien is excludable on the true facts, or
> b. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (AG 1961).

The record contains a certified statement of conviction/disposition from the Circuit Court of Cook County, Illinois for [redacted] (the applicant's alias). The record reflects that the applicant was charged with retail theft/shoplifting under Illinois Criminal Statute 720-5.0/16A-3-A, but on April 24, 2000 the case was stricken off with leave to reinstate. *Certified Statement of Conviction/Disposition*, dated May 8, 2006. The certified statement does not reflect the date of arrest. *Id.*

Therefore, the true facts, i.e. that the applicant was arrested for retail theft/shoplifting with the charges being dismissed do not render the applicant inadmissible to the United States. In addition, her misrepresentation did not shut off a line of inquiry that was relevant to her eligibility and that might well have resulted in a proper determination that she be found inadmissible, as the charges were dismissed and she was not convicted.

Based on the record, the AAO finds that the applicant did not misrepresent a material fact and is not inadmissible under section 212(a)(6)(C)(i) of the Act. The waiver application filed pursuant to section 212(i) of the Act is therefore moot.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file for a waiver of inadmissibility. Accordingly, the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the waiver application is moot. The acting district director shall reopen the applicant's Form I-485 for action consistent with this decision.